

# DOCKET NO. 2008-160-C

## Oral Argument on Motion to Strike and Motion to Compel

January 8, 2009



# HOW WE GOT HERE

dPi filed a complaint asking the Commission to order AT&T to give dPi certain bill credits.

\$85,350 in SC (*Bollinger Direct at 4*)

\$499,600 across 9 states (*Bollinger Direct at 5*)

In Data Requests, AT&T asked dPi whether, and if so, how it passes these types of credits along to its South Carolina end users. (*AT&T's First Data Requests Nos. 9-11, 13-16, & 20*)

dPi refused to answer these questions and moved to strike a portion of AT&T's Answer.

## TODAY'S ISSUE

When you decide the merits of this dispute, do you want to be able to consider what impact your decision may have on end user customers in South Carolina

or

Do you want to decide the merits of this dispute without being able to consider what impact your decision may have on end user customers in South Carolina.

# OUTLINE OF ARGUMENT

- I. dPi's Motion to Strike.
- II. End User Impact is Relevant (dPi's Motion to Strike and to AT&T's Motion to Compel).
- III. Burdensome and Harassing (AT&T's Motion to Compel)

# I. DPI'S MOTION TO STRIKE

Dpi “moves to strike that portion of the answer of AT&T claiming that the doctrine of laches allows AT&T to explore, present, or argue the issue of whether or not the promotional credits at issue in this proceeding can, have, or will be passed on to dPi end users.” (*Motion to Strike Defense at 1*)

# I. DPI'S MOTION TO STRIKE

“In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: . . . laches . . . statute of limitations . . .” S.C.R. Civ. P. 8(c).

AT&T's Answer affirmatively sets forth the defense of laches. Answer at ¶13.

Answer was filed May 30, 2008.

# I. DPI'S MOTION TO STRIKE

“Upon motion pointing out the defects complained of, and made by a party . . . within 30 days after service of the pleading upon him . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” S.C.R. Civ. P. 12(f).

dPi filed its Motion to Strike on August 28, 2008 – 90 days after AT&T's Answer.

The defense is not redundant.

The defense is not scandalous.

The defense is not immaterial, impertinent, or insufficient.

# I. DPI'S MOTION TO STRIKE

“Under the doctrine of laches, if a party, knowing his rights, does not seasonably assert them, but by unreasonable delay causes his adversary to . . . detrimentally change his position, then equity will ordinarily refuse to enforce those rights.” *Sloan v. Dep’t of Transportation*, 666 S.E.2d 236, 243 (S.C. 2008).

Cited at p. 3 of dPi’s Motion to Strike



# I. DPI'S MOTION TO STRIKE

## Knowing its rights

November 2003: dPi knew its customers were ordering services that it thought entitled dPi to bill credits. (*Bollinger Ex. 1*)

# I. DPI'S MOTION TO STRIKE

## Does not seasonably assert its rights

- August 2004 dPi knew that AT&T would not provide those bill credits. (*Seagle Direct at 6-9*)
- December 2005 dPi began asking for those bill credits. (*Exhibit KAS-4*)
- January 2007 dPi stated its disagreement with AT&T's decision not to provide those bill credits (*Seagle Direct at 10-11*)
- April 2008 dPi filed its complaint (*Complaint*)

# I. DPI'S MOTION TO STRIKE

## Detrimentially change its position

For some of the bill credits at issue, AT&T no longer has records that would reflect whether dPi's end users met the qualifications of the promotions for which dPi seeks the bill credits. (*Bracy Affidavit*)

AT&T did not keep them because AT&T did not know they were in dispute until after they had aged off the system.

## II. END USER IMPACT IS RELEVANT (BOTH MOTIONS)

AT&T is entitled to obtain discovery “regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party.” (*S.C.R. Civ. P. 26(b)*; *accord S.C. Code Regs. §§103-833A; 103-835*).

## II. END USER IMPACT IS RELEVANT (BOTH MOTIONS)

Laches defense is a valid part of this case.

dPi acknowledges that in considering that defense, you need to balance the equities of the case. (*Response to Motion to Compel at 4*; see also cases cited in footnote 9 to AT&T's Motion to Compel).

dPi, however, claims that in balancing the equities, you can consider AT&T and dPi, but not end user customers. (*Response to Motion to Compel at 4*)

## II. END USER IMPACT IS RELEVANT (BOTH MOTIONS)

dPi has cited no law supporting its very restrictive view.

Under federal law, the Commission to considers “the public interest, convenience, and necessity” in approving or rejecting negotiated interconnection agreements like the ones at issue in this docket. *47 U.S.C. §252(e)(2)*.

Under state law, the “public interest” includes “concerns of the using and consuming public with respect to public utility services, regardless of the class of customer.” §58-4-10; 58-4-50(4).

### III. AT&T'S MOTION TO COMPEL

dPi's "burdensome" objection

Since making that objection, dPi has answered the exact same Data Requests in the companion North Carolina proceeding.

dPi's "harassing" objection

Data Requests are not "harassing" merely because a party would prefer not to answer them.

# CONCLUSION

AT&T is asking the Commission to:

Deny dPi's Motion to Strike

Grant AT&T's Motion to Compel